

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE,

v.

**DEBRA KEITH,
A/K/A/ DEBRA D. KEITH,
ID NO: 0908004615**

Defendant.

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Submitted: April 21, 2010
Decided: July 30, 2010

*Upon Consideration of
Defendant's Motion to Suppress*
GRANTED

OPINION AND ORDER

Stephen R. Welch, Jr., Esq., Department of Justice, Dover, Delaware for the State.

Kevin M. Howard, Esq., Young, Malmberg & Howard, Dover, Delaware for the Defendant.

Young, J.

SUMMARY

Defendant Debra D. Keith (“Defendant”) filed a Motion to Suppress on February 26, 2010. Defendant was arrested on August 6, 2009, and was indicted on October 5, 2009 for Driving a Vehicle Under the Influence of Alcohol (“DUI”). A suppression hearing was held before this Court on April 21, 2010. Defendant contends that all evidence against her was seized in violation of her rights under the Fourth Amendment to the United States Constitution and Article I, Section 6 of the Constitution of the State of Delaware.

The State maintains that, given the totality of the circumstances, Defendant’s arrest was proper, and, therefore, all evidence was properly obtained. Because unequivocal and specific consent was not given to the arresting officer to enter Defendant’s home, and because exigent circumstances did not exist to justify the intrusion, Defendant’s Motion to Suppress is **GRANTED**.

FACTS

On August 6, 2009, an off-duty, plain-clothed Clayton police officer (“Officer Rau”) was traveling northbound on State Route 13 (“Route 13”) in Felton, Delaware. Officer Rau was driving his personal vehicle, and was accompanied by a passenger. While traveling in the northbound direction, Officer Rau observed a white Pontiac G6 driving northbound as well. Defendant was later identified as the driver of this vehicle.

According to Officer Rau, Defendant’s vehicle was initially in front of his vehicle in the left lane of Route 13. He testified that Defendant abruptly decreased her speed, pulled behind his vehicle, tailgated him for a period of time, and flashed her high beams intermittently. After engaging in this rather bizarre driving pattern,

Defendant regained her position in front of Officer Rau's vehicle in the left lane. Officer Rau testified that, soon after Defendant's vehicle assumed the lead position, his passenger informed him that one of Defendant's passengers had thrown an unknown object out of the vehicle.

Defendant then pulled into a crossover to turn around, and to head southbound on Route 13. When she stopped, Officer Rau exited his vehicle, approached Defendant's vehicle, identified himself as a police officer, displayed his badge, and instructed Defendant to remain stopped. Shortly thereafter, without communication with Officer Rau, Defendant drove away. Defendant maintains that she drove away due to "the lateness of the hour and the unusual nature of [Officer Rau's] behavior."¹ Officer Rau proceeded to follow Defendant to her home.

While en route to Defendant's home, Officer Rau dialed 911. He reported that he was following a driver exhibiting the erratic behavior of an intoxicated driver, to wit: that Defendant was swerving all over the road. During his 911 call, Officer Rau additionally relayed that he personally observed beer bottles being thrown from Defendant's vehicle. He requested that a Delaware State Police trooper be dispatched to Defendant's home, where he had subsequently arrived. Officer Rau then waited for the responding Delaware State Police trooper. While much of the description by Office Rau is contested, it can be presumed for these purposes.

There are starkly contrasting versions of how the events at Defendant's home transpired. According to Defendant, upon arrival, she and her passengers immediately exited her vehicle and entered the house. Defendant contends that Corporal Brower, the Delaware State Police trooper who responded to the 911 dispatch, approached the house, and began banging on the garage doors and windows.

Defendant submits that, when her father answered the door, Corporal Brower

¹Def.'s Mot. to Suppress at 2.

stepped inside the house, and ordered everyone out of the residence. When Defendant failed to comply, Corporal Brower allegedly walked farther into the house, grabbed Defendant by her arm, escorted her out of the house, and deposited her directly into his police vehicle.

According to Corporal Brower, as he was proceeding up the driveway of Defendant's residence, he could see Defendant and her companions milling about in the yard. Upon the activation of Corporal Brower's lights and emergency equipment, everyone standing outside of the house quickly retreated inside the residence. In fact, as Corporal Brower parked his vehicle, he testified that the garage door was still closing. He stated that he looked into the windows of the garage, and knocked on the door of the residence. He also conceded that, when Defendant's father answered the door, he crossed the threshold of the door, and ordered the occupants of the vehicle outside.

Once outside, Corporal Brower testified that Defendant became belligerent and combative. Corporal Brower formally arrested Defendant, handcuffed her, and placed her into a police vehicle after Defendant attempted to kick one of the other occupants of the vehicle. In addition to Defendant's aggressive behavior, the alleged bases for Defendant's arrest were: (1) a strong odor of alcohol emanating from Defendant's person; (2) an observation that her eyes were bloodshot; and (3) her slurred speech.

Defendant was transported to Troop 3 in Dover, Delaware. While at Troop 3, an independent contractor for Omega Medical Center conducted a blood draw in a Troop 3 interview room. The State asserts that Defendant voluntarily submitted to this blood draw.

STANDARD OF REVIEW

On a Motion to Suppress evidence, the State bears the burden of proving that the alleged search or seizure did not violate the United States Constitution, the

Delaware Constitution, or Delaware statutory law.² “The burden of proof is ‘considerably less than proof by a preponderance of the evidence, and even less demanding than probable cause.’”³ “In Delaware, an individual’s right to be free from unlawful searches and seizures is secured by the Fourth Amendment of the United States Constitution[,] which guarantees that individuals will be ‘secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’”⁴ Additionally, Delaware’s Constitution guarantees individuals to be “secure in their persons, houses, papers and possessions, from unreasonable searches and seizures.”⁵

DISCUSSION

There are several questions presently before the Court. First, does the initial interaction between Officer Rau and Defendant constitute an unlawful stop? Second, did Corporal Brower’s command that Defendant and her companions exit Defendant’s residence amount to an unlawful arrest? Finally, was Defendant’s blood draw performed in accordance with 21 *Del. C.* § 2746? This opinion will address these inquiries *seriatim*.

The Initial Interaction Between Officer Rau and Defendant

Defendant initially asserted that her vehicle was “forcibly stopped by [Officer Rau’s vehicle[,] and his show of authority made her believe she was not free to leave.”⁶ Defendant contended that this stop was unlawful. After a review of the

² *State v. Betts*, 2009 WL 388952, at *4 (Del. Super. Ct. Feb. 3, 2009).

³ *State v. Porter*, 2004 WL 2419166, at *2 (Del. Super. Ct. Sept. 29, 2004) (citing *Quarles v. State*, 696 A.2d 1334, 1337 (Del. 1997)) (additional citations omitted).

⁴ *Id.* (citing U.S. Const. Amend. IV) (additional citation omitted).

⁵ *Id.* (citing Del. Const. art I, § 6).

⁶ Def.’s Mot. to Suppress at 2.

record, there appears to be no real dispute between the parties that Defendant's initial interaction with Officer Rau did not constitute an unlawful detention.

The testimony reveals that, by her own volition, Defendant pulled into a turnaround on Route 13 to head in the southbound direction. When Defendant's vehicle stopped, Officer Rau exited his vehicle, identified himself as a police officer, presented his police badge, and instructed Defendant to remain pulled over. Officer Rau did not initiate Defendant's physical stop.

Furthermore, beyond the fact that the initial interaction was not precipitated by Officer Rau, Defendant ultimately ignored his instruction and drove away. This interaction is not an unlawful seizure, when the Defendant did not submit to the officer's authority, but subsequently left the scene. Therefore, the Court finds that Defendant's original position on the illegality of Officer Rau's conduct has, by testimonial development of the record, become a non-issue.

The Arrest

Before examining the validity of the arrest in this case, the Court must clarify the term "arrest." According to 11 *Del. C.* § 1901(1), arrest is defined as "the taking of a person into custody in order that [she] may be forthcoming to answer for the commission of a crime."⁷ "An arrest need not be couched in the formal language of arrest; 'it is enough that the suspect understand that [she] is in the power of the one arresting and/or that her locomotion is impeded.'"⁸ "When the formal indicia of arrest are lacking, a seizure of that person has occurred when, in view of all the

⁷ 11 *Del. C.* § 1901(1).

⁸ *State v. Rizzo*, 634 A.2d 392, 395 (Del. Super. 1993) (quoting *State v. Korotki*, 418 A.2d 1008, 1011 (Del. Super. 1980)).

circumstances, a reasonable person would believe that [she] is not free to leave.”⁹ For purposes of this discussion, Defendant’s arrest occurred when she was commanded to exit her residence by Corporal Brower, who was standing inside the threshold of her home.¹⁰

The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, prohibits police from making a warrantless, nonconsensual entry into a person’s home for purposes of search or seizure, unless the State can establish that the exigent circumstances make the warrantless entry imperative.¹¹ The plain language of the Fourth Amendment applies equally to search and seizure of both persons and property.¹²

While noting that the degree of intrusiveness may differ between a police entry to search and seize personal property, and an entry to arrest, the United States Supreme Court, in *Payton v. New York*, held that both intrusions involve the breach of the entrance into an individual’s home.¹³ “The Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.”¹⁴ The same Fourth Amendment analysis applies to either type of intrusion – entry to search and seize or entry to

⁹ *Id.* (citing *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988)) (additional citation omitted).

¹⁰ The State has emphasized that the residence in question belonged to Defendant’s parents, and was not, in fact, her home. The Court finds no merit in this distinction. Defendant testified that, due to difficulties she was having during the operative time, she was living with her parents. Their home, therefore, was her home.

¹¹ *See Payton v. New York*, 445 U.S. 573, 590 (1979).

¹² *Id.* at 590; *see also, Mason v. State*, 534 A.2d 242, 534 (Del. 1987).

¹³ *Id.* at 589.

¹⁴ *Id.*

arrest.

Consent

Although a resident may consent to a warrantless entry into his home to arrest a person, the State has the burden of proving that unequivocal and specific consent was given by a person with authority to do so.¹⁵ “The State does not meet its burden of showing consent to enter merely from the defendant’s failure to object to the entry, since this would[,] in essence[,] shift the burden from the state to the defendant to show unequivocal objection to a police entry.”¹⁶ The Court examines the totality of the circumstances to determine the validity of the consent.¹⁷

In the case *sub judice*, the State posits that Defendant’s father gave valid consent to Corporal Brower to enter the home. As the owner of the home, Defendant’s father certainly possessed the authority to grant or deny entry into the home. The question for the Court, however, is whether he actually consented to the trooper’s entry of the home.

As a preliminary consideration, there are competing accounts of how the events on the night in question transpired. According to Defendant, Corporal Brower grabbed her arm, escorted her out of the house, and immediately placed her in his police car. Corporal Brower, however, recalls the events quite differently.

Corporal Brower testified that, as he was driving up the driveway, he switched on his lights and activated his emergency equipment. It is his testimony that this action caused the Defendant, as well as her companions, to dart inside the garage. Upon Defendant’s father answering the door, Corporal Brower explained that he

¹⁵ *Rizzo*, 634 A.2d at 396 (citing *United States v. Shaibu*, 920 F.2d 1423, 1427-28 (9th Cir. 1990)).

¹⁶ *Id.*

¹⁷ *Id.*

stepped inside the threshold of the house, and ordered the occupants of the car to exit the residence. In fact, when pressed on the matter during cross-examination, Corporal Brower conceded that his mandate was not optional. There was no testimony that, when Defendant's father opened the door, Corporal Brower asked to come in or was invited in.

The Court finds the State has not met its burden of proof to establish that Defendant's father – or Defendant for that matter – gave *unequivocal* and *specific consent* for the officer to enter the home. The facts indicate that Corporal Brower entered Defendant's home, and commanded her to exit out of the residence. Given this finding, the State may not rely upon consent as an exception to the constitutional warrant requirement.

Exigent Circumstances

Absent consent, warrantless searches and seizures are presumed unreasonable and violative of the Fourth Amendment, even when supported by probable cause, unless exigent circumstances exist to justify the intrusion.¹⁸ Exigent circumstances have been found to exist, and thus a warrantless intrusion is justified, where there is “a hot pursuit of a fleeing felon, or imminent destruction of physical evidence ... or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling.”¹⁹

“Specifically, courts have found the following factors to be relevant in determining exigency: (1) the degree of urgency involved and the amount of time needed to obtain a warrant; (2) the reasonable belief the contraband is about to be removed; (3) the risk of danger to the police guarding the site while waiting for the

¹⁸ *State v. Wilson*, 2001 WL 845749, at * 3 (Del. Super. July, 6, 2001) (citing *Welsh v. Wisconsin*, 466 U.S. 740 (1984)).

¹⁹ *Id.* (citing *Minnesota v. Olsen*, 495 U.S. 91, 100 (1990)) (citations omitted).

search warrant; (4) police information that the suspects are aware the police are on their trail; (5) police knowledge that traffickers of the suspected contraband characteristically attempt to dispose of destructible contraband and escape.”²⁰

Upon consideration of the factors relevant to the present case, the Court finds insufficient exigency in the factual background of this case to justify the warrantless intrusion into Defendant’s home at approximately 2:30 a.m. The State has not established any credible degree of urgency in making this arrest, nor that it would have taken unduly long for Corporal Brower to obtain a warrant from a neutral and detached magistrate. Further, the facts demonstrate no concern of removal of contraband or police safety in watching the home while waiting for a warrant. Although Defendant was aware that the “police were on her trail,” Corporal Brower did not testify that he had any concern that Defendant might attempt to escape the residence.

Police must obtain and use warrants whenever reasonably practicable, and their unexplained failure to secure a warrant when they had enough time to do so mandates a finding that the search or seizure was unlawful.²¹ The State has failed to demonstrate that sufficient exigency existed in this situation to justify the nonconsensual intrusion into the constitutional sancity of the home.

The Blood Draw

The Court’s rulings above render legal analysis of Defendant’s statutory construction challenges, with regard to 21 *Del. C.* § 2746, academic. The Court will not, therefore, address these arguments.

²⁰*Id.* (citing *State v. Ada*, 2001 WL 660227, at * 3 (Del. Super. Jun. 8, 2001)) (additional citations omitted).

²¹ *Mason*, 534 A.2d at 249 (citing *State v. Reader*, 328 A.2d 146, 149 (Del. Super. 1974)).

CONCLUSION

For the foregoing reasons, this Court finds that all evidence, including the chemical test results, gathered as a result of the seizure of Defendant at her home in violation of Defendant's constitutional rights must be suppressed. Defendant's Motion to Suppress is **GRANTED**.

_____ **SO ORDERED.**

/s/ Robert B. Young
J.

RBV/sal
oc: Prothonotary
cc: Counsel
File
